This clearly put the question of the appellant's intention to the jury and it also directed that if they had any doubt, which, reading the passage as a whole, must mean any doubt as to his intention, they must acquit. The statement of the deceased about the threat to stab was evidence which the jury could take into consideration.

The learned judge then proceeded:—

> "There is one other point with regard to the intention and that is, assuming you are satisfied that these two persons conspired to rob and that you are satisfied that the prisoner knew the other man had a knife and was prepared to use it, you might have doubts of the intention to use it either to cause death or to cause an injury which they knew would be likely to cause death. But it might occur that a knife was used not with any intention of causing death or of causing an injury which they knew to be likely to cause death. But it is not what actually happens that you consider—it is the intention of the man who inflicts the wound, and you may infer when a wound of that kind is caused—driving this knife, inwards, downwards in that part of the body—you may infer an intention to cause an injury which is known to be likely to cause death. You may, if you have a doubt on the matter, you may infer that there was no intention in either of these matters and that there was an intention merely to cause grievous hurt. But what you have to be satisfied of in the main is the intention with which these people set out and if you are satisfied as I have already explained to you, that there was an intention to use that knife, if necessary even to the point of causing serious injury which they knew would be likely to cause death, these men would be guilty of murder."

We do not think any exception can be taken to this passage in the summing up. It was necessary for the jury to consider the intention of X in ascertaining the intention of the appellant because the question being, whether the appellant had a common intention with X, then if that is answered in the affirmative, it is necessary to ascertain what X's intention was in order to ascertain what was the intention which the appellant had in common with X.

There was evidence from which the jury could infer that X intended to cause such bodily injury as he knew to be likely to cause death or that he intended to inflict an injury which was sufficient in the ordinary course of nature to cause death, and there was evidence from which they could infer that the appellant shared this intention with X, in other words that he had a common intention with X that these injuries should be inflicted.

As we have pointed out, the defence being an *alibi* the appellant could give no evidence about what he intended to do to effect the robbery, or that he first heard of X's intent to stab when it was too late for him to withdraw or to disassociate himself with X's intent.

We cannot say that there was no evidence from which the jury might not reasonably infer that the appellant set out with X to commit robbery and that both intended to effect that robbery by inflicting fatal injury on the victim.

We are also of opinion that proper and adequate direction was given by the judge on common intention.

The appeal is dismissed.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]

AITKEN, J.

April 1, 1940.

IN RE ESTATE DUTY ORDINANCE, 1929, S. 36.

IN RE THE ESTATE OF T.M.R.M. VENGADASALAM CHETTIAR DECEASED.

[PENANG ORIGINATING PETITION No. 14 of 1939]

Estate Duty Ordinance, s. 36, sub-s. 1—Property of joint Hindu family—Whether property standing in the name of one member of joint Hindu family who subsequently dies is chargeable with estate duty on the whole of the value of such property or not.

A Hindu testator died leaving a will in which he stated he was the sole owner of a one half share in a Chettiar firm known as M.R.M.A. In connection with the probate of his will questions arose as to the valuation of this asset for the purpose of assessment of estate duty. The executor on behalf of two sons of the deceased contended that at the time of the death of the testator he was a member of an undivided joint Hindu family comprising the Testator and his said two sons and that such joint Hindu family (and not the testator himself) was the owner of the said one half share in the said Chettiar firm. The Commissioner of estate duties rejected that contention and the executor thereupon applied by originating petition under s. 36, sub-s. 1 of the Estate Duty Ordinance.

Held, (1) that the executor was not estopped from denying the statement contained in the testator's will to the effect that the testator was the sole owner of the one half share in the said Chettiar firm.

(2) that the Hindu law relating to joint Hindu families and joint Hindu family property is applicable to a case such as this in the Straits Settlements.

(3) that where a joint Hindu family is constituted by a father and his two sons, both the latter being under age, the father is the manager of the joint Hindu family property with wide powers of management and he is also the **de facto** guardian of the co-parcenary interests therein of his two sons so long as they remain minors but neither such powers of management nor his position of guardian enables the father to dispose of any part of the joint Hindu family property by will.

Held also, that where self-acquired property is blended with joint Hindu family property in such a manner that it is impossible to separate the two component parts the whole may be presumed to be joint property.

Held further, on the facts of the case that the testator and his said two sons constituted a joint Hindu family at the time of the testator's death.

Held further, on the facts of the case that the one half share in the M.R.M.A. firm belonged to the testator and his two sons as constituting a joint Hindu family.

Held further, that the testator was not a trustee of the said one half share in the said firm for himself and his two sons and that he was not competent to dispose of the whole one half share at the time of his death.

In re Estate of R.M.A.T.M. Meyappa Chettiar(2).

Cases referred to:—

(1) *De Nicols v. Curlier,* (1898) 1 Ch. 403; (1900) A.C. 21.

(2) *Meyappa Chettiar, In re Estate of,* Ipoh Originating Summons No. 242 of 1937, unreported.

(3) *Periyacaruppan Chettiar v. The Commissioner of Stamp Duties,* Ceylon case decided in 1936.

(4) *State of Perak v. P.R.A.L.M.M. Muthukaruppan Chettiar,* (1938) F.M.S.L.R. 154; (1938) 8 M.L.J. 247.

(5) *Whicker v. Hume,* 11 E.R. 50.

ORIGINATING PETITION.

R. D. Hume for petitioner.

E. A. de Buriatte for Commissioner of Estate Duties.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Aitken, J.—The late T.M.R.M. Vengadasalam Chettiar, to whom I will henceforward refer as "the testator", was undoubtedly domiciled in India at the time of his death, which took place on the 2nd of May, 1938, at Karaikudi in the Ramnad District of South India.

By his last will and testament, which he executed in the presence of a notary public and two witnesses at Karaikudi on the 18th of February 1938, the testator appointed one P.K.M.S.P. Subramanian Chettiar, who appears to be a near relative of his, to be his executor, and purported to divide the whole of his property in India and Malaya, less certain sums for charity, between his two sons Arunasalam and Somasundram in equal shares as therein mentioned. His said two sons were 18 and 16 years of age respectively at the date of execution of the testator's last will and testament, and the elder of them appears to suffer from the grave misfortune and handicap of total blindness. For these reasons, which are specifically mentioned in the will itself, the testator has made somewhat elaborate provision for the management of the whole of his estate by his executor until the younger son comes of age, and for the management of the elder son's half share by the executor and the younger son after that event and for its subsequent devolution should the elder son marry and beget male issue.

Probate of the testator's last will and testament was duly granted to the executor therein named, the said P.K.M.S.P. Subramaniam Chettiar, by the Supreme Court of the F.M.S. on the 12th of April 1939, and such probate was duly resealed in this Court on the 22nd of May, 1939.

The only asset of the testator's estate which is situate in these Settlements, and therefore liable to estate duty under our Estate Duty Ordinance, is a share in a Chettiar Money lending firm which does business at Penang under the style or vilasam of M.R.M.A. According to the testator's last will and testament he owned a one half share in the M.R.M.A. firm as his own self-acquired property at the time of his death, and not unnaturally the Commissioner of Estate Duties has assessed the value of this asset on the basis that the whole of that half share passed on the death of the testator. The executor, however, contends that at the time of his death the testator was a member of an undivided joint Hindu family comprising himself and his said two sons Arunasalam and Somasundram, and that such joint Hindu family, and not the testator himself, was the owner of all the assets mentioned in the last will and testament including the said half share in the Chettiar money lending firm of M.R.M.A.

As a consequence of the rejection of this contention by the Commissioner of Estate Duties, the executor has applied to me, as a Judge of the High Court, by originating petition under and in accordance with s. 36, sub-s. 1 of the Estate Duty Ordinance. If his contention is correct, and if the Hindu law relating to joint Hindu family property is applicable to cases arising in these Settlements under our Estate Duty Ordinance, then it is conceded that the property in these Settlements which passed on the death of the testator is a one sixth share only in the said M.R.M.A. firm, and that the testator's estate will be entitled to a refund of the sum of $2,893.70 being the amount

of duty overpaid. The originating petition concludes with a prayer for the repayment of this sum, together with interest thereon, to the executor-petitioner.

Upon a careful consideration of the arguments put before me by Mr. Hume for the executor-petitioner and Colonel de Buriatte for the Commissioner of Estate Duties, and the authorities cited in support of those arguments, I have come to the conclusion that four issues of law and two issues of mixed law and fact have arisen in this matter for my decision. These issues may be stated thus:—

1. Is the executor-petitioner estopped from denying the statement contained in the testator's will to the effect that he was the sole owner of a one half share in the M.R.M.A. firm?

   Colonel de Buriatte contends that he is, and Mr. Hume contends that he is not.

2. Is the Hindu law relating to joint Hindu families and joint Hindu family property applicable to a case like this in the Straits Settlements?

   Mr. Hume contends that it is, and Colonel de Buriatte contends that it is not.

3. What is the Hindu law relating to joint Hindu families and joint Hindu family property?

   Both learned Counsel have agreed that I may endeavour to ascertain the relevant provisions of the Hindu law from the authoritative text books which they have cited to me, and that no objection will be taken by either side to the absence of any expert oral evidence as to what these provisions are. I have also, at Colonel de Buriatte's request and with Mr. Hume's consent, consulted typescript reports of the Ceylon case of **Periyacaruppen Chettiar v. The Commissioner of Stamp Duties**, which was decided in 1936, and the F.M.S. Supreme Court case **In re Estate of R.M.A.T.M. Meyappa Chettiar** (Ipoh Originating Summons No. 242/37), which was decided by Gordon-Smith, J. a few days ago. It is understood, of course, that either party will be at liberty to appeal against my findings on this issue, should he consider them, or any of them, to be incorrect.

4. Did the testator and his two sons Arunasalam and Somasundram constitute a joint Hindu family at the time of the testator's death?

   Mr. Hume contends that they did, and though I do not remember Colonel de Buriatte specifically asserting the contrary, he certainly did not admit Mr. Hume's contention on the point.

5. Did the one half share in the M.R.M.A. firm belong to the testator and his two sons as constituting a joint Hindu family, or did it belong solely to the testator as his separate property?

6. Mr. Hume asserts the former proposition and Colonel de Buriatte the latter.

7. Assuming that the one half share in the M.R.M.A. firm did belong to the testator and two sons as constituting a joint family, was the testator a trustee thereof for himself and his two sons and, as such, competent to dispose of the whole half share at the time of his death?

   Colonel de Buriatte asserts that he was, and though Mr. Hume did not specifically deal with that contention in his reply, I feel certain that he did not intend to concede it.

Having thus stated the issues which appear to have arisen in this matter for my decision, I will deal with them in the order in which they are set out above.

As to the first issue, which appears to be one of law, I have felt no difficulty in deciding that the executor-petitioner is not estopped from denying the statement in the testator's will to the effect that he was the sole owner of a one half share in the M.R.M.A. firm. An executor is only liable to pay estate duty "in respect of all property of which the deceased was competent to dispose at his death"—see s. 21, sub-s. 1 of the Estate Duty Ordinance—and it is surely obvious that a testator cannot, by his own mere *ipse dixit,* endow himself with property belonging to others.

Quite apart from that self-evident proposition an executor is under a statutory duty to tell the Commissioner of Estate Duty the truth and nothing but the truth when he files the requisite estate duty affidavit; and as he has to make all such statements of fact as may be relevant to the assessment of estate duty upon oath or affirmation, a failure to tell the truth upon his part may lead to serious consequences upon which I need not dwell. Assuming that he has told the truth, when I am clearly of opinion that the executor-petitioner's action in that regard cannot properly be regarded as an opposition to the testator's will. No doubt he is prepared to carry out its provisions so far as is possible, and the passage at page 102 of *Everest and Strode's* Law of Estoppel (3rd edn.) on which Colonel de Buriatte relied does not seem to me to afford any support for his contention. I have examined the authorities there cited by the learned authors, and it seems to me that the case of *Whicker v. Hume*[5] is entirely against Colonel de Buriatte. In particular I venture to refer to passages in the judgments of Lord Cranworth and Lord Wensleydale which are to be found at pages 63 and 66 of the report respectively.

As to the second issue, which also appears to be one of law, I am clearly of opinion that the Hindu law relating to joint Hindu families and joint Hindu family property is applicable to a case like this in the Settlements. It is said that there is no authority directly in point, but since *De Nicols v. Curlier*[1] has established, beyond possibility of doubt, that the French law as to the community of goods, which applies to the parties to certain forms of French

marriage, may affect the distribution of the husband's estate in England, even though he and his wife have become naturalised British subjects and he has made an English will purporting to dispose of all his property, I think, on principle, that the Hindu law relating to Hindu joint families and joint Hindu family property must apply to a case like this, especially as the testator never lost his Indian domicile and made an Indian will.

Then again, though the decisions of the Appeal Court of the F.M.S. are not binding on the High Court of the Straits Settlements and though it may be, too, that the case of *The State of Perak v. P. R. A. L. M. M. Muthukaruppan Chettiar*[4] settled nothing except that when learned counsel announces that he has not got a leg to stand on, the trial Judge should examine both his legs carefully before he acts on such an admission, nevertheless:—both from personal recollection and from a re-perusal of the lengthy report of that case, I am under a strong impression that every one engaged therein, whether at the Bar or on the Bench, assumed that the Hindu law as to joint Hindu families, and joint Hindu family properties, was applicable to an estate duty case in the F.M.S. which concerned the estate of a deceased Chettiar moneylender. Assuming that my impression in that respect is correct—and it is borne out by several subsequent cases in the Supreme Court of the F.M.S., then I see no reason why the High Court of these Settlements should not adopt the same view in regard to an estate duty case which also concerns the estate of a deceased Chettiar moneylender.

As to the third issue, the Hindu law relating to joint families and joint family property is a vast and very difficult subject. However, it is only necessary for me to ascertain and state so much of it as is applicable to the known facts of this case, and that is all that I have sought to do. Thus, for the purposes of this case, I apprehend the relevant Hindu law of the Mitakshara School to be as follows:—

> All property inherited by a male Hindu from his natural or adoptive father, father's father or father's father's father, is ancestral property; and it must be borne in mind that ancestral property can only be acquired by inheritance from a male paternal ancestor, and not by devise or gift inter vivos. The essential feature of all ancestral property is that the sons, grandsons and great grandsons of the person who inherits it, acquire an interest in it by birth. Their rights attach to it at the moment of their birth, and they and their (or grandfather or great grandfather as the case may be) become a joint Hindu family holding and continuing to hold such ancestral property as their joint family property as co-parceners until the co-parcenary is terminated by partition, or withdrawal of one or more members, or the relinquishment of his share by one or more members.

When once a Hindu family is joint it is presumed to remain joint until the contrary is shown. The normal state of a Hindu family is one of jointness.

Where any property is shown to have been once joint family property, it is presumed to remain joint family property until the contrary is shown.

All accretions to joint family property arising by way of income, or from its user in trade or business, become part of such joint family property.

Each son upon his birth takes an interest equal to that of his father in ancestral property, whether it be moveable or immoveable. It is very important to note that the right which the son takes at his birth in the ancestral property is wholly independent of his father. He does not claim through the father, and, therefore, a transfer by a father of his own interest in the ancestral property cannot affect the interest of the son in the property.

In Hindu law a business—and the expression business includes the whole of a business or a share in it—it is a distinct heritable asset. Where a Hindu dies intestate leaving a "business", it descends like other heritable property to his heirs. If he dies leaving male issue, whether natural or adopted, it descends to such issue. In the hands of such male issue it becomes joint family property, and the joint ownership so created between such male issue is not an ordinary partnership arising out of contract, but a family partnership created by operation of law.

Where a joint Hindu family is constituted by a father and his two sons, both the latter being under age, the father is the manager of the joint family property (if any) with wide powers of management, and he is also the *de facto* guardian of the co-parcenary interests therein of his two sons so long as they remain minors. Neither such powers of management, however, nor his position of guardian, enables the father to dispose of any part of the joint family property by will.

Adoption has the effect of transferring the adopted boy from his natural family into the adoptive family. It confers upon the adoptee the same right and privileges in the family of the adopter as those of a natural and lawful son, except in a few cases relatitng to the adoptee's marriage and his own rights to adopt. None of these excepted cases have any bearing upon the questions now before me.

Any adult Hindu may dispose of his own separate property by will or by gift or other disposition *inter vivos*, but no co-parcener, not even a father, can dispose

of his undivided co-parcenary interest by will, even though the other co-parceners should consent to the disposition. The reason for this is said to be that at the moment of death the right of survivorship of the other co-parceners is in conflict with the attempted disposition, and the title by survivorship, being the prior title, must prevail.

The following property constitutes the self-acquired property of a member of a joint Hindu family, which he may dispose of by will or gift or other disposition *inter vivos*:—

(a) Property acquired by inheritance from a lineal ancestor more than three degrees remote or from a collateral or from or through a female relation;

(b) Property acquired by gift or devise;

(c) Property acquired without detriment to the joint estate;

(d) Property which is the gains of learning or science acquired without substantial help from the joint funds; and

(e) Property which by its nature or extent or the mode of its acquisition is incapable of joint ownership.

Where self-acquired is blended with joint property in such a manner that it is impossible to separate the two, the whole may be presumed to be joint property.

I now come to the fourth issue, and it seems to me that the executor-petitioner has discharged the burden of proof which rests on him, and has proved that the testator and his two sons Arunasalam and Somasundram did constitute a joint Hindu family at the time of the testator's death. In regard to this issue the evidence before me appears to be entirely one sided, because there is no effective reply to the sworn statements of the executor-petitioner and A.S.P. Subramanian Chettiar in support of the affirmative. I appreciate the fact that the testator's last will and testament is not easy to reconcile with the existence of a joint Hindu family constituted by himself and his two surviving sons, but the small probative force of that last will and testament in regard to this issue cannot, in my opinion, prevail over two uncontradicted sworn statements by persons in a position to know the truth of the matter supported, as they are, by the presumption that every normal Hindu family is a joint family. I should add, perhaps, that it does not thence follow that a joint Hindu family must necessarily possess some joint property: see *Gour's* Hindu Code, 3rd edn., page 685 para. 1375.

Next we have the fifth and, to my mind, the most important and difficult issue: "Did the one half share in the M.R.M.A. firm belong to the testator and his two sons as constituting a joint Hindu family, or did it belong solely to the testator as his separate property?"

The burden of proving that this one half share in the money lending business carried on at Penang under the vilasam M.R.M.A. belonged to the testator and his two sons as their joint family property rests, in my opinion, on the executor-petitioner. I must therefore ask myself, in the first place, what evidence he has adduced to discharge that burden of proof.

My answer to this question is as follows:—There can be no real doubt but that the executor-petitioner has proved the following facts:—

(1) That the testator was the adopted son of the late T.M.R.M. Ramanathan Chettiar, who adopted the testator because he had no lawful and natural son of his own;

(2) That the late T.M.R.M. Ramanathan Chettiar was carrying on a money lending business at Penang, in partnership with one N.A. Vengadasalam Chettiar and under the vilasam M.R.M.A., at any rate so long ago as the year 1900 and possibly for several years before that date;

(3) That the late T.M.R.M. Ramanathan Chettiar's share in the M.R.M.A. moneylending business was a one half share; and

(4) That this one half share in the M.R.M.A. business somehow or other passed to the testator.

These findings of fact bring the executor-petitioner within sight of success, but they leave one small though formidable gap to be bridged, and to my mind everything in this case turns on this one question of fact:—has the executor-petitioner succeeded in proving that the testator inherited this one half share in the M.R.M.A. firm from his adoptive father T.M.R.M. Ramanathan Chettiar? If the answer is in the affirmative, then I am of opinion that it must be regarded as having been, at the time of the testator's death, the joint family property of the joint Hindu family constituted by the testator and his two sons Arunasalam and Somasundram. If the answer is in the negative, then it seems to me that the Estate Duty Commissioner's view must prevail both because the executor-petitioner has failed to discharge the burden of proof which, in my opinion, rests on him, and because the testator, in his last will and testament, has clearly dealt with this half share in the M.R.M.A. business as though it were his own separate property.

I must confess to a period of doubt and hesitation as to what answer I should give to this all important question, and to a feeling that other judicial minds

might well arrive at a different answer to that at which mine has at length arrived. I feel, too, that if the learned counsel for the Commissioner of Estate Duties had cross-examined the executor-petitioner and A.S.P. Subramanian Chettiar on their affidavits in support of the petition, my task might have been an easier one. The fact remains, however, that he did not cross-examine either of them on his affidavit, though both could, presumably, have been made available for the purpose; and when a very learned and experienced counsel neglects to cross-examine a material witness on his affidavit, it seems to me that the only inference the Court can properly draw is that learned counsel had no hope of being able to destroy any part of such witness' evidence or detract from his credibility as a witness by cross-examining him.

It follows then, on the above method of reasoning, that I must accept all statements to be found in the affidavits of the executor-petitioner and A.S.P. Subramanian Chettiar as being the truth and nothing but the truth, unless and to the extent to which such statements are obviously untrue, or are contradicted or questioned by the affidavit sworn herein by Alanghat Raman Kutty Nayar of the Estate Duties Office at Singapore.

Let me first of all set out the statements in the affidavits of the executor-petitioner and A.S.P. Subramanian Chettiar which are directly in point on the question now under my consideration, and then turn to Alanghat Raman Kutty Nayar's affidavit and see to what extent (if any) it does contradict or question any of them.

In paragraph 7 of his affidavit the executor-petitioner stated that the testator's adoptive father Ramanathan Chettiar died in or about the year 1903, and that after his death his half share in the M.R.M.A. firm passed to the testator by inheritance as ancestral property.

In paragraph 5 of his affidavit A.S.P. Subramanian Chettiar stated that the testator's adoptive father died about 34 or 35 years ago—"I cannot remember the exact year"—and that after his death the testator, as being his only adopted son, acquired the whole of his late father's interest in the moneylending business of M.R.M.A. at Penang. Later on, in paragraph 7 of his affidavit, A.S.P. Subramanian Chettiar stated as follows:—that all the property possessed by the testator was ancestral property, or acquired by purchase out of ancestral property; and that on their respective births the testator's two sons Arunasalam and Somasundram acquired a co-parcenary interest in all such property by virtue of being members of a joint Hindu family.

I may as well say at once that I regard both the executor-petitioner and A.S.P. Subramanian Chettiar as being in a position to know whether the testator did, in fact, inherit his father's half share in the money-lending business of M.R.M.A. at Penang. Their means of knowledge appear quite clearly from their respective affidavits, and I need not set them out specifically. I am also definitely of opinion that no one of these statements which I have extracted from their affidavits is obviously untrue.

And now for the affidavit of Alanghat Raman Kutty Nayar, who is an Assistant Probate Examiner in the office of the Commissioner of Estate Duties at Singapore, and who examined some of the account books of the M.R.M.A. firm in the course of his duties as such Assistant Examiner. The books which he so examined were those in use at the time of the testator's death and for a period of about 3 years immediately preceding that event.

In paragraphs 3, 4 and 5 of his affidavit he states as follows:—(a) that there is no mention in those books of any interest in the firm belonging to either of the testator's two sons Arunasalam and Somasundram; (b) that those books showed that the testator owned a half share in the business; (c) that if the half share shown as belonging to the deceased had been held by him and his two sons as joint family property, the names of his two sons would have appeared in those books "as part owners in accordance with the usual practice"; and (d) no books have been produced to the Commissioner of Estate Duties "relating to any joint family business of the mark T.M.R.M."

Just as Colonel de Buriatte omitted to cross-examine the executor-petitioner and A.S.P. Subramanian Chettiar on their affidavits, so did Mr. Hume omit to cross-examine Alanghat Raman Kutty Nayar on his. I am far from imputing any blame to either learned counsel, because they may well have been deterred from taking the necessary steps by perfectly valid considerations of time and expense; but this failure to cross-examine has made my task distinctly more difficult. In particular it is so in regard to Alanghat Raman Kutty Nayar's affidavit, which contains several allegations which are contrary to my own experience of Chettiar money lending firms' books.

It appears to be a fact, too, that the one half share in this M.R.M.A. firm which is now under consideration is expressed in all the firm's books to belong to "T.M.R.M."—just those letters, no more: at any rate that is what both learned counsel have told me.

To my mind that is a fact of sufficient importance to have received a mention in this gentleman's affidavit.

However, I will take his statements which I have set out as (a), (b), (c) and (d) above one by one, and endeavour to weigh them against the statements which I have previously extracted from the affidavits of the executor-petitioner and A.S.P. Subramanian Chettiar respectively.

As to statement (a), in my experience a set of letters such as "T.M.R.M.", when found in the books of a Chettiar moneylending firm, may equally well denote (1) a single person, (2) a joint Hindu family using that vilasam, or (3) another Chettiar moneylending firm. I am therefore of opinion that the absence from those books of any specific reference to the testator's sons Arunasalam or Somasundram is of little or no probative force.

As to statement (b), this is really a *petitio principii* of the question at issue. So far as I have been allowed to see, the books simply show that a half share in the business belongs and belonged to "T.M.R.M."; and I have already expressed my view as to the probative value of such entries.

As to statement (c), my criticism of statement (a) is directly in point and applies with equal force to this statement.

As to statement (d), in the first place I am not quite sure that I have correctly grasped its meaning. Assuming, however, that the deponent means that he expected the M.R.M.A. firm to produce books relating to the T.M.R.M. joint family and its business or businesses, then I am personally not surprised that he was disappointed in that expectation.

Well, I have done the best I can with the material at my disposal, and I have certainly examined it with care and pondered it with anxiety. In the result I have come to the conclusion that the executor-petitioner has succeeded in proving that the testator inherited the one half share in the M.R.M.A. firm from his adoptive father T.M.R.M. Ramanathan Chettiar. As a result of this conclusion the sixth issue becomes one of practical importance.

And so we come to the last and sixth issue which may be stated thus:—can the testator properly be regarded as having been a trustee of the one half share in the M.R.M.A. firm for himself and his two minor sons at the time of his death? I must confess that I should have had no great difficulty in answering that question in the negative, had it not been for the judgment of Gordon-Smith, J. in the very recent F.M.S. case of *In re Estate of R.M.A.T.M. Meyappa Chettiar* (Ipoh Originating Summons No. 242/37) to which Colonel de Buriatte has drawn my attention.

From a perusal of a typescript copy of the judgment in that case it does appear that the learned Judge held as follows. That where a share in a Chettiar moneylending business in the F.M.S. is the property of a joint Hindu family consisting of a father and his minor son, the whole of that share must be regarded as having passed on the father's death because, at the time of his death, he was a trustee for himself and his minor son.

The question then arises, shall I follow the learned Judge by way of judicial comity rather than by way of conviction, or shall I decide this issue in accordance with my opinion. The easy way out of this dilemma is, of course, to follow the learned Judge; but if I have arrived at a definite and contrary conclusion on my own view of Hindu law, would such a course be fair to the executor-petitioner and in accordance with my duty? I do not think that it would.

I must confess, then, that the learned Judge's decision seems to me to be directly opposed to what I imagine to be one important principle of the Hindu law as to joint families. I have already stated that principle in the first paragraph of my disquisition on the third issue, but I will endeavour to elucidate and explain it by literal question from the learned authors on which Mr. Hume and Colonel de Buriatte respectively relied, thus:—

Mulla (8th edn.) p. 238, s. 223:—

> "All property inherited by a male Hindu from his father, father's father, or father's father's father, is ancestral property. The essential feature of ancestral property according to the Mitakshara law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest in it by birth. Their rights attach to it at the moment of their birth. This if A. inherits property, whether movable or immovable, from his father or father's father, or father's father's father, it is ancestral property as regards his male issue. If A. has no son, son's son, or son's son's son in existence at the time when he inherits the property, he holds the property as absolute owner thereof, and can deal with it as he pleases. But if he has sons, sons' sons, or sons' sons' sons in existence at the time, or if a son, son's or sons' sons' son is born to him subsequently, they become entitled to an interest in it by the mere fact of their birth in the family, and A. cannot claim to hold the property as absolute owner, nor can he deal with the property as he likes."

Gour, (3rd edn.), p. 1248, s. 269:—

> "(1) When a person dies possessed of co-parcenary property, his interest therein passes to the other co-parceners then living, by right of survivorship, who take it in their own right and not in trust for the heirs of the deceased.
>
> (2) Provided that where he has left sons or grandsons in the male line his interest survives to them to the exclusion of his other co-parceners.
>
> (3) Where such property passes to the surviving co-parceners, they take **per stirpes** and not **per capita.**"
>
> "From what has been said before, it is clear that co-parcenary property held by the joint family is in the nature of property held by a co-parcenary with perpetual existence, the members whereof vary, but the death of a member has no greater effect beyond causing a lapse of his share. As the Privy Council said: 'According to the principles of Hindu law, there is co-parcenership between the different members of a united family, and survivorship follows upon it; there is community of interest and unity of possession between all the members of the family, and upon the death of any one of them, the others may well take by survivorship that in which they had, during the deceased's lifetime, a common interest and a common possession.

It may be that I have misunderstood these passages from *Mulla* and *Gour,* but at present I find it so very difficult to reconcile my learned brother's decision in the Ipoh case with them, that I have reluctantly decided that I cannot follow it. It is an unfortunate and notorious fact that Judges, in regard to difficult points of law, differ almost as often as they agree; and taxation cases are frequently of peculiar and repulsive difficulty. It is also an unfortunate and notorious fact that the costs in such cases may easily exceed the amount in dispute, which is not quite in accordance with the highest ideals of justice. Unofficial litigants, who have to pay their own costs, seem to me to deserve a generous need of sympathy.

And this remark brings me to the end of a lengthy and laborious inquiry which will doubtless be reviewed in a higher Court. Upon the view which I have taken of the issues set out above, the executor-petitioner appears to be entitled to judgment in accordance with the prayer at the conclusion of his petition.

Order accordingly.

Solicitors for petitioner:—*Hogan, Adams & Allan.*

Solicitors for Commissioner of Estate Duties:—*Presgrave & Matthews.*

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.